Supreme Court, U.S.
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No. 02-1843

IN THE

Supreme Court of the United States

DONALD SHEPARD,

Petitioner,

v.

JOANN CAVALIERI, as plenary guardian of the Estate of STEVEN CAVALIERI, a disabled person,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Donald Shepard's Petition for a Writ of Certiorari is based on a single premise: that a city police officer's duties under 42 U.S.C. § 1983 terminate immediately when an arrestee is transferred to a county jail for holding. Shepard extends this premise to two scenarios: not only does he argue that Section 1983 liability ceases when a detainee moves from one state agency to another (Pet. pp. 2, 7, and 12 n.2); Shepard also argues that an *individual* officer must have the detainee in *his or her* actual custody in order for a duty to continue (Pet. pp. 2, 9, and 11). Shepard's position is that a state actor cannot be held liable under Section 1983 for anything he may do or fail to do after an arrestee is transferred, even if the state actor is aware of the transferee's substantial risk of suicide, need for medical attention, or other risk to the well-being of the transferee or those around him. This contention has been characterized by two federal courts as "an argument of breathtaking cynicism." *Ramirez v. City of Chicago*, 82 F. Supp. 2d 836, 839 (N.D. Ill. 1999); *Reddick v. Bloomingdale Police Officers*, No. 96 C 1109, 2001 U.S. Dist. LEXIS 9619, at *31 (N.D. Ill. July 11, 2001).

The dispute lies within the boundaries of two polar positions acknowledged by the parties. Shepard does not quarrel with the established law that a custodial officer has a duty to act in a way that is not deliberately indifferent to the risk perceived. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); Pet. at 13. Cavalieri does not here challenge the established law that a state actor is not liable for injuries suffered by a plaintiff who is not in any form of state custody at the time of injury. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 201 (1989). Cavalieri's contention, upheld by both the Seventh Circuit Court of Appeals and the

United States District Court for the Central District of Illinois, is that state custody means state custody. Shepard's position is that the words "custody" and "custodial officer" should be construed more restrictively, even in the absence of any authority for such a restrictive reading.

The parties also disagree on the nature of the Seventh Circuit's holding. In Shepard's understanding, the Seventh Circuit has "created[] a new class of duties which law enforcement officers now owe to persons held in custody by another agency." Pet. at 7. In Crawford's submission, the Seventh Circuit in *Crawford v. Shepard*, 321 F.3d 670 (7th Cir. 2003), has simply restated and applied existing law. Shepard maintains that the alleged absence of specific precedent governing his particular facts constitutes a lacuna in the established law. In contrast, Crawford submits that (1) there was and is established law concerning the scope and responsibilities of a suicidal arrestee in state custody, and (2) if that established law is to be changed, the proponent of change carries the burden to justify the change in the form of all relevant sources of guidance in the law. This is where Shepard has not met, accordingly, Crawford opposes Shepard's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

The petition asserts that "[i]n no case . . . petitioner has found, in no case cited by the plaintiff here, and in no case cited by the district court or the appellate court below, has a person in custody been found to hold [a Section 1983] right against an officer who does not have custody of him." Pet. at 9. This statement is incorrect.

A state actor has qualified immunity from suit if the claimed constitutional right at issue was not "clearly established" at the time the events occurred. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). To be clearly established, the "contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates the right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court has recognized that there need not be a case that has specifically held that the very act in question is unlawful; all that the law must be clear enough that an officer has fair notice that his actions are unlawful. *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986); *Davis v. Scherer*, 468 U.S. 183, 191 n.8 (1984); *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002). The appellate court below identified the right in question as "the right to be free from deliberate indifference to suicide." *Cavalieri*, 321 F.3d at 623 (7th Cir. 2003), Pet. App. A at 11a. That right was clearly established prior to Steven Cavalieri's 1998 suicide attempt. *See Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992).

Nevertheless, Shepard in his petition challenges the appellate court for citing "no prior cases which held that an

officer owes a duty to a prisoner or a detainee *who is not in his custody* to keep the custodial agency advised of information the officer learned about the prisoner after custody was transferred." Pet. at 11 (emphasis added). Even this is incorrect. In *Vero v. Bufano*, 901 F. Supp. 1387, 1394 (N.D. Ill. 1995), cited with approval by the Seventh Circuit in *Saucedo*, 324 F.3d at 933, Pet. App. A at 12a, the plaintiff's decedent committed suicide while in the custody of an Illinois correctional facility. An Illinois court probation officer had allegedly failed to communicate information as to the inmate's mental health to the correctional facility. *Vero*, 901 F. Supp. at 1388. Despite the probation officer's lack of custody over the inmate, she was not entitled to qualified immunity from suit. *Id.* There were genuine issues of material fact whether the probation officer had been deliberately indifferent to the strong likelihood that the inmate would commit suicide. *Id.*

Although district court decisions such as *Vero* have "no weight as precedent," *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995), "a court should look to all available decisional law, including decisions of state courts, other circuits and district courts" in determining whether a right is clearly established. *Buckley v. Haggerson*, 122 F.3d 1112, 1120 (8th Cir. 1997); *see also Vaughn v. Ruoff*, 253 F.3d 1256, 1260 (10th Cir. 2001) (in determining whether a right is clearly established, "we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit"). Further, even if there were no cases with facts similar to those in the instant case, "[a] constitutional right that is so patent that no violator had even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent." *Anderson*, 72 F.3d at 526-27.

The Seventh Circuit and the Eighth Circuit are in agreement, without demur from any other circuit, that even in the "complete absence of any decisions involving similar facts, a right can be clearly established if a reasonable public official would have known her conduct was unconstitutional." *Vaughn*, 253 F.3d at 1130; *Burgess v. Lowery*, 201 F.3d 942, 944-45 (7th Cir. 2000). In *Burgess*, the Seventh Circuit observed:

> [T]he absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in other court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in state courts, that no one thought it worthwhile to litigate the issue. Citations omitted. To rule that until the Supreme Court has spoken no right of litigants in this circuit can be deemed established unless we have decided the same would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages.

Id. at 945 (emphasis in original). At issue in *Burgess* was the practice of strip searches of prison visitors. The test for "clearly established," according to the Seventh Circuit,

> ought to be whether a reasonable official in the position of [the particular defendant(s)], considering all relevant sources of guidance to the law, might have thought it reasonably possible that this court or eventually the U.S. Supreme Court would hold that strip searches of prison visitors are proper even without reasonable suspicion.

Id. at 946. The same logic applies to Shepard in the instant case, with particular application to his suggestion that he has a safe harbor once custody is transferred to another state actor. In fact, the Seventh Circuit in *Burgess* went so far as to say that even contrary decisions by other federal appellate courts or state courts would not necessarily provide a defendant state actor with a "safe harbor." *Id.* The reasonableness of a state actor's conduct is determined in light of the particular facts of the case and the state of the law from "all relevant sources." *Id.*

The defendants in *Burgess*, like the petitioner in the matter *sub judice*, argued that "because the doctrine [at issue] was not mentioned in the previous cases on which the plaintiffs rely to show that the right sought to be enforced in this case is well established, those cases are not authority for the plaintiffs' position." *Id. See* Pet. at 9 ("[i]n no case . . . petitioner has found, in no case cited by the plaintiff here, and in no case cited by the district court or the appellate court below, has a person in custody been found to hold such a right against an officer who does not have custody of him"). The Seventh Circuit in *Burgess* made short work of that argument:

> [Defendants] are clearly wrong, though we can find no case on the question, because it would mean that any time a state official could think of an argument for some position that had not been mentioned in a previous decision the contrary of that position could not be considered established in law. Decisions would have no authority if their writ ran only to the arguments explicitly discussed in them.

Id.

Among the "relevant sources of guidance" to whether the law is clearly established is common sense. *Fruit v. Norris*, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (holding that "common sense" suggested that prison officials should know that unprotected contact with human waste would cause disease). "Simply because there is no clearly defined case law condemning certain conduct does not mean police officers should be free to engage in such conduct, no matter how offensive or destructive to a fair and just society that conduct may be, and then hide behind the shield of qualified immunity." *Grendell v. Gillway*, 974 F. Supp. 46, 52 (D. Me. 1997).

In *Ramirez*, 82 F. Supp. 2d at 839, fire department paramedics argued that they had no responsibility under Section 1983 to provide an arrestee with medical care, because he was in police custody at the time. The court, relying on *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991), held that "if [the plaintiff] was in custody from the time the paramedics arrived – that is, if he was not free to seek other forms of assistance – then the paramedics might be liable for violating [his] right to due process by failing to treat his injuries." *Id.*, quoting *Salazar*, 940 F.2d at 237.

> The Seventh Circuit [in *Salazar*] expressly did not limit the liability of the paramedics to cases where persons were in *their* custody, but extended it to include persons who [were] in the custody of police *when the paramedics arrived*. . . . Mr. Ramirez, handcuffed and on his face, was certainly in custody and unable to seek other aid . . . [This] disposes of the contention that the plaintiffs' state law claim should be dismissed because he was not in their custody. It doesn't matter as long as he was in state custody.

Ramirez, 82 F. Supp. at 840 (emphasis in the original).

In *Salazar*, the paramedics argued expressly that the pretrial detainee "was not in their custody." *Salazar*, 940 F.2d at 237. The Seventh Circuit contrasted "custody" with "freedom to leave," regardless of which state agency had custody, observing that "it may be that . . . the paramedics knew that Salazar was not free to leave." *Id.* The parties in *Salazar* agreed that *Salazar* should be treated as a pretrial detainee. *Id.* The fact that *Salazar* was in police custody, not the paramedics' custody, did not offer the paramedics a safe haven; rather, their case went to the jury. *Id.* at 241.

The court in *Ramirez* described the paramedics' argument that they had no duty under Section 1983 to treat a man who was not in their specific custody as "an argument of breathtaking cynicism." *Id.* at 839. As the Seventh Circuit recognized in *Cavalieri*, "[t]he fact that several state agencies were working together on [Steven Cavalieri's] case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change [the court's] analysis." *Cavalieri*, 321 F.3d at 623-24, Pet. App. A at 13a. This general observation has even more force under the facts of the instant case, where Cavalieri remained under city police investigation while he was temporarily held in the county jail, and where Shepard himself continued to investigate the incident that gave rise to Cavalieri's arrest. Pet. App. A at 4a.

The appellate court below also relied upon *Egebergh v. Nicholson*, 272 F.3d 925 (7th Cir. 2001), and *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998). *Egebergh* was a Section 1983 action against two police officers arising from the death of an arrestee in a Cook County jail. The record established that the police officers knew the arrestee was an insulin-dependent diabetic who required regular insulin injections. *Egebergh*, 272 F.3d at 928. Not only did the police

officers fail to administer an insulin shot, they also failed to inform the county jail about the arrestee's need for insulin injections. *Id.* The court in *Egebergh* held that these facts defeated defendants' motion for qualified immunity. *Id.* The fact that the death of the arrestee occurred while he was in county custody rather than police custody was irrelevant.

In *Collignon*, the Seventh Circuit found that Milwaukee County was not responsible for the suicide of an arrestee who killed himself after being released to his parents. In his petition, Shepard urges that *Collignon* supports his "no custody, no foul" argument. Pet. at 13. But as the Seventh Circuit recognized in *Cavalieri*, *Collignon* is clearly distinguishable because at the time of his suicide the arrestee was no longer in state custody at all, whereas Steven Cavalieri was. *Cavalieri*, 321 F.3d at 623, Pet. App. A at 11a-12a. Moreover, as the Seventh Circuit noted in *Cavalieri*, even under the facts of *Collignon*, where there was no state custody at the time of the suicide, the case may have been decided differently if the county jail's psychiatrist had known that the arrestee "was on the verge of committing suicide." *Collignon*, 163 F.3d at 990; *Cavalieri*, 321 F.3d at 623, Pet. App. A at 12a.

In *Cavalieri*, the Seventh Circuit stated that "[n]othing in *Collignon* implies that the court was establishing a general rule of non-liability for transferees":

> In fact, Shepard's argument implies that he did not have to pass along *any* information to his colleagues at the county jail. No responsible person in Shepard's position would have taken such a position. If Steven had been armed, Shepard could not have stayed silent and waited to see if

> the CCCF officials found a weapon; if Steven was prone to violent outbursts, Shepard similarly could not have left his colleagues and the other detainees at Steven's mercy. While there are different arms of state government, the walls between them are not as high as Shepard implies. To the contrary, each must keep the other informed about material facts, including suicide risks. [Citations omitted.] Even the *Collignon* court conceded that it would have been facing a different problem if the officials had known that the detainee was a likely suicide risk.

Cavalieri, 321 F.3d at 623, Pet. App. at 12a (emphasis in original).

Thus, although defendant correctly states that, under *Collignon*, "the constitutional duty to provide health care flows directly from the fact of custody," Pet. at 12, that observation does not support defendant's advocacy of a new limitation, that the relevant custody must be continuously exercised by defendant himself.

The appellate court below also cited *Estate of Novack v. County of Wood*, 226 F.3d 525 (7th Cir. 2000). In *Novack*, an arrestee was a schizophrenic and possible suicide risk. He was taken into custody by the city police department, then transferred from the city police station to the county jail. *Id.* at 527. Although the Seventh Circuit found that the county could not be held liable under Section 1983 because "deliberate indifference" by its personnel could not be established, the opinion is noteworthy for the exchange of information between the city police and the county jail.

Unlike Shepard in the instant case, the police officer, Deputy Starks, "informed [the county officer] that Novack was a suicide risk and that [county] staff should watch him accordingly." *Id.* at 528. Police Officer Starks' conduct in *Novack* is precisely the proper standard for Shepard's duty in the instant case: communicating information about a substantial suicide risk while an arrestee remains in state custody, unable to attend to his own needs.

At a minimum, a genuine issue of material fact exists as to Shepard's deliberate indifference, because he took no action to inform the county jail of Steven's substantial risk of suicide. Another factual issue at trial will be Shepard's awareness of Steven's substantial risk of suicide. *Cavalieri*, 321 F.3d at 620-21, Pet. App. A at 7a-8a. The transfer of custody from city to county, or from Shepard to another individual officer, did not toll the bell on Shepard's responsibility or potential liability. *Id.* at 623-24, Pet. App. A at 13a. Such an argument, in the words of *Ramirez* quoted above, is one of "breathtaking cynicism."

II. THE DECISION BELOW WAS CORRECT.

The Seventh Circuit's holding was simply that, taking the facts in the light most favorable to Cavalieri, a trier of fact could find that Shepard was deliberately indifferent to Cavalieri's suicide risk, and thus liable under 42 U.S.C. § 1983 as a consequence of Cavalieri's suicide attempt. *Cavalieri*, 321 F.3d at 620, Pet. App. A at 13a. Accordingly, summary judgment in Shepard's favor was inappropriate. At trial, the jury may find that Shepard was aware of Cavalieri's substantial risk of suicide, and that he was deliberately indifferent. Alternatively, the jury

may find that Shepard was negligent, but that he did not act with deliberate disregard.[1]

Review on a writ of certiorari is not a matter of right, and a petition for a writ of certiorari will be granted only for compelling reasons. S. Ct. Rule 10. Petitioner has cited no disagreement among federal or state courts regarding liability for transferees. S. Ct. Rule 10(a), 10(b). As discussed above, there is no conflict between the Seventh Circuit's decision and the decisions of this Court in *Hope*, *Saucier*, *Farmer*, or any other case. S. Ct. Rule 10(c). Nor does petitioner provide any instance of departure by the Seventh Circuit from the accepted and usual course of judicial proceedings. S. Ct. Rule 10(b).

There is no suggestion that the Seventh Circuit sanctioned such a departure by the trial court. S. Ct. Rule 10(a). The record before the trial court established "a factual dispute [that cannot] be resolved at the summary judgment stage." Pet. App. B at 44a-45a. Based on this record, the Seventh Circuit held that summary judgment was inappropriate, and affirmed the judgment of the district court. *Cavalieri*, 321 F.3d at 623, Pet. App. A at 13a.

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1. In his dissenting opinion, Circuit Judge Manion agreed with the majority that "on the date of Cavalieri's nearly successful suicide attempt it was clearly established that a police officer could not act with deliberate indifference toward a pretrial detainee who the officer believed was a suicide risk," citing *Estate of Cole v. Fromm*, 94 F.3d 254, 258 (7th Cir. 1996). Pet. App. A at 21a. However, Judge Manion disagreed with the court's conclusion that the facts most favorable to the plaintiff were sufficient to allow a jury to conclude that Shepard acted with deliberate indifference or with reckless disregard for Cavalieri's safety. Pet. App. A at 14a. In Judge Manion's view, Shepard's failure to notify the jail may have been negligent, but not deliberately indifferent. Pet. App. A at 14a-15a, 19a. His Honor's criticism was that the majority had "equated deliberate indifference with negligence." Pet. App. A at 15a, 19a, 21a.

The proper destination for this case is not the Supreme Court of the United States, but the United States District Court for the Central District of Illinois, for resolution of the factual dispute by the trier of fact. There is no basis for certiorari.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

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